Supreme Court, U. S.
FILED
SEP 28 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER, 1927, TERM.

No 561

MARK SKINNER WILLING AND THE NORTHERN TRUST COMPANY, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY J. WILLING, DECEASED, AND MARK S. WILLING,

Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.
Brief in Support.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable The Supreme Court of the United States:

Your petitioners, The Northern Trust Company and Mark S. Willing as trustees under the last will and testament of Henry J. Willing, deceased, and Mark S. Willing, individually, praying for a writ of certiorari to review a decision in the United States Circuit Court of Appeals for the Seventh Circuit reversing a decree entered in the District Court of the United States for the Northern District of Illinois, Eastern Division, and remanding the case for further proceedings, respectfully submit:

Questions of equity jurisdiction and of federal jurisdiction are involved in this suit, filed on the chancery side of court and called a bill to remove clouds from title. It arises from the desire of Chicago Auditorium

Association, an Illinois corporation, respondent here and plaintiff below, to tear down the nationally known Auditorium Building in Chicago and to erect in its stead a skyscraper adapted to commercial purposes, all without the consent of these petitioners and others owning the property.

Whether the Association has the right so to alter the use of the premises depends upon the meaning and effect of leases between these petitioners and others as lessors and the Association as lessee. Prior to litigation, the lessee orally asserted it has such right under a proper construction of its leases. The petitioners (lessors) orally answered that the lessee has not the right. Thereupon, claiming that these petitioners' views, so expressed, constitute a cloud upon its leasehold title, the respondent (lessee) instituted this proceeding for "removal" of the "cloud".

After a trial, the District Court, upon these petitioners' motions, dismissed the bill for want of equity jurisdiction, deciding that under both local and general law no cloud on respondent's title existed, that no wrong had been done or threatened by any defendant, and that the self-styled bill to remove clouds from title was simply a disguised application for a declaratory judgment or decree construing the leases. (The trial court's opinion, reported at 8 Fed. (2nd) 998, also is printed as Appendix I at page 29, *post*.)

On appeal by the Association, the Circuit Court of Appeals for the Seventh Circuit reversed the decision of the District Court, holding that under "liberal" principles of law in states other than Illinois a cloud on title was sufficiently alleged to invoke equity jurisdiction for its removal. The court then remanded the case for trial upon the merits. (The opinion, not yet reported, appears as Appendix II at page 51, *post*.)

Grounds for Certiorari.

Confident they can demonstrate to the Supreme Court that no cloud upon title exists and that without such cloud equity jurisdiction is lacking, your petitioners submit these reasons for the granting of the writ of certiorari:

1. The Circuit Court of Appeals, by its reversal, has decided an important question of local law in a way in conflict with applicable local decisions, in that the Circuit Court of Appeals has decided certain facts do constitute a cloud upon title to Illinois property, whereas controlling Illinois law declares said facts do not constitute any cloud upon title.

2. The Circuit Court of Appeals, by its decision thus conflicting with local law, has erroneously constructed a non-existent cloud upon title, without which wrong no proper case or controversy is presented; and so the entire proceeding becomes an application for a declaratory decree simply construing contracts *inter vivos*.

3. Obedience to that local law which defeats equity jurisdiction by eliminating the alleged cloud upon title was further precluded by the erroneous persistence of the federal courts in retaining the suit under the Removal Act, notwithstanding that citizens of the same state are plaintiff and defendant and that no separable controversy exists as to the removing party.

4. The Circuit Court of Appeals, by its decision, has decided an important question of general law in a way conflicting with decisions of the Supreme Court of The United States and conflicting with decisions of other Circuit Courts of Appeals, in that the court has held a plaintiff's own title can be adjudicated in a suit brought to remove alleged clouds, whereas this honorable court has said a plaintiff's own title cannot be adjudicated in such suit.

STATEMENT OF THE CASE.

The facts upon which your petitioners base the foregoing reasons for the granting of the writ of certiorari are as follows:

The bill of complaint (R. 3) was filed June 13, 1923, in the Circuit Court of Cook County, State of Illinois. It avers and subsequent evidence tended to prove Chicago Auditorium Association, incorporated in 1886 for the purposes of constructing and maintaining a building containing a large auditorium and rooms with facilities for musical, dramatic, operatic and other entertainments, to encourage the holding of large gatherings, and to found and maintain galleries and organizations for useful and aesthetic arts, leased five adjoining parcels of land situated in Michigan Avenue at Congress Street in the business district of Chicago under five substantially similar indentures dated early in 1887, for 99 years, three of which were extended in 1891 for 100 years. On this site the Association, pursuant to covenants in the leases, erected the monumental Auditorium Building, which is an unseverable unit in construction and includes one of the world's finest auditoriums, a 300-room hotel and many offices.

For forty years the building has remained and now is in constant unimpaired use. Although the building continues to satisfy amply the semi-institutional purposes for which the Association was founded and financed, men unconcerned with those purposes recently obtained a controlling amount of capital stock (R. 245, 259), changed the chartered objects of the corporation (R. 4), and proposed to tear down the building in order to replace it with a commercial skyscraper from which "we would get a benefit, a large revenue." (R. 258.)

Admittedly the leases do not expressly grant to the lessee the rights it sought. Whether, under any and all the covenants of the leases, such rights were conveyed by implication called for the answer, as the respondent itself says (R. 29), to "a question which, as between your orator and the defendants owning or interested in the fee of said property * * presents a common issue of law and fact substantially identical with respect to the interests of the said several defendants."

The lessee proceeded to sound out its landlords, starting in 1921, when R. Floyd Clinch, its president, broached the proposal to the owners of one tract. Those landlords were and are trustees of decedents' estates, citizens of Boston and New York, and are known in the record as the Sears-Slater Trustees. They hold title to about 10% of the total ground area under the Auditorium. Two or three friendly conferences with them were held in Chicago, during which they and their counsel discussed quite informally the respective rights of lessors and lessee. Finally President Clinch suggested buying the Sears-Slater tract or increasing the ground rental to gain sanction for his plan. No agreement was reached, however, and President Clinch in 1922 went to the office of these petitioners who own about 80% of the fee. There President Clinch related briefly his negotiations with the Sears-Slater interests and said no deal was possible unless the Association could simultaneously buy or control the Willing fee. "Mr. Willing seemed to think that he didn't know whether he cared to sell," testified President Clinch. (R. 242 *et seq.*) "He disagreed with me as to our ideas of right to reconstruct without consent, but in the course of the conversation they said they might sell for $1,500,000 [being less than one-half the appraised value. R. 286-7]. I told

them that was out of the question; that we could not consider anything of the kind, and if we could not come to any closer terms I presumed that the only thing to do would be to bring a friendly suit in equity. Well, he said he guessed that was the only thing that could be done."

Thereupon the conference ended, and *that is literally everything done or said by these petitioners to "cloud" the Association's title.* (The evidence commences on page 240 of the record, running on two ensuing pages, and is resumed at page 253 briefly). All that transpired was confined, so far as these petitioners are involved, to one friendly conference attended only by the parties themselves. No threat or suggestion of any affirmative action ever was made. Nothing was written; all was oral and privately conducted.

No further negotiations were attempted, but after a year, during which all was tranquil, the bill of complaint was filed.

The plaintiff's case showed the making of the leases, extension agreements with these petitioners and with the Sears-Slater Trustees, construction of the present building by the lessee pursuant to the leases, use thereof for nearly forty years without financial profit, prospects of further loss, etc., and that the highest and best use of the property for the financial gain of the lessee would be the replacement of the Auditorium Building by a modern skyscraper costing more than the old one and adapted to commercial purposes. Nevertheless, concludes the bill (R. 28; also at R. 239) the defendants "or some of them" "claim and assert, and by reason of such claim and assertion" bankers asked to finance the proposed new undertaking are "fearful" "that the present building cannot be removed without a violation of the terms, covenants and conditions" of the leases,

even though the removal be incidental to erection of a new building. (It is not contended that any lessor ever expressed any views of any sort to any banker or other person).

Lastly, the bill attempts to define the cloud upon title which the court is to remove (R. 28):

> "The aforesaid claims, fears and uncertainties respecting the rights of the parties to said leases, based upon the terms, covenants and conditions of the leases of said property have greatly impaired the value of the leasehold interests of your orator, and have made them unmarketable, and have prevented your orator from exercising its rights with respect to said leasehold interests so as to secure therefrom the highest and best use of its interest in the land; and the terms, covenants and conditions of the said leases, in so far as they give color to said claims, fears and uncertainties, are clouds upon the title of your orator, for the removal of and relief against which your orator has no adequate remedy in a court of law."

The prayer for relief (R. 31) asks "that this court will remove from the several leasehold interests of your orator the above mentioned claims and clouds based upon the alleged force and effect of the terms, covenants and conditions of the aforesaid leases, and will fully quiet and establish the title of your orator to the said leasehold properties with full right on the part of your orator to tear down and remove any and all buildings which for the time being may be upon said premises" upon giving security to be fixed by the court until a new building is completed. When the program has been defined and all the new terms have been decreed, the defendants are to be enjoined from interference with its execution.

No allegation is made and no proof was offered that any defendant ever has done aught which remotely hampers the lessee in the full and perfect enjoyment of its present use and occupancy of the demised prem-

ises authorized in the leases. The only complaint is a lack of concurrence by the petitioners in the lessee's future program for its financial gain; and the petitioners' lack of concurrence originated after voluntary challenge by the lessee, having been evidenced solely by oral statements made to none but the lessee.

Motions to dismiss under Equity Rule 29 were made by these petitioners as defendants (R. 137), and others. On April 18, 1924, Judge James H. Wilkerson, District Court Judge, overruled the motions (R. 140), but simultaneously filed his "Decision On Motion To Dismiss" (R. 140), stating that the points urged in support of the motion might be pressed after the testimony had been taken. Thereafter the petitioners answered (R. 160), and much evidence was received, for under the circumstances both sides went into the factual issues.

On December 7, 1925, after arguments and briefs, the trial judge made his decision (R. 542), which, after stating at length the facts as they appeared to the court, declared the bill of complaint not sustainable as a bill to remove clouds from title because no cloud existed, and not sustainable under any other established principle of chancery procedure. (See Appendix I, p. 50, *post.*) On January 30, 1926, a short decree dismissed the bill "for want of equity jurisdiction to grant any relief upon the pleadings and the evidence, but without prejudice to whatever rights the plaintiff may have under the leases here involved when asserted in any appropriate proceeding or otherwise." (R. 563.)

An appeal was taken by Chicago Auditorium Association to the Circuit Court of Appeals for the Seventh Circuit, which, on June 7, 1927, entered orders reversing the decree and remanding the case with direction to the District Court to hear the evidence and determine

the issues involved. (R. 611.) Rehearing was denied August 30, 1927, and mandate later was stayed (R. 665) for this petition.

The holding of the Circuit Court of Appeals is contained largely in this language of the opinion (p. 58, *post*):

> "And too, though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if accompanied by a hostile [oral] assertion by an adverse claimant, be the basis of a cloud on title."

To reach its conclusions, and particularly its conclusion as to what constitutes a cloud upon title in this case, the Circuit Court of Appeals completely ignored many decisions of the Supreme Court of Illinois holding that a title is not clouded by oral hostile assertions of opinion as to the construction of provisions in the instrument under which a plaintiff claims his own title. (Brief, pp. 16-19, *post*.) And in remanding the case, the Circuit Court of Appeals fails to inform the trial court what to remove as a cloud. These matters were pointed out by your petitioners repeatedly (see especially their Petition for Rehearing, R. 617-8), but the Circuit Court of Appeals omitted all explanation for its decision so conflicting with local laws.

Had the case been decided in an Illinois court, your petitioners think compliance with Illinois substantive law would naturally have brought about a result directly contrary to the present reversal. Your petitioners believe that both the United States District Court and the Circuit Court of Appeals wrongfully persisted in retaining federal jurisdiction under the Removal Act. Twice these petitioners attempted to have the case remanded, but in vain.

The original bill of complaint was filed in the Circuit

Court of Cook County, an Illinois state court. Its removal to the federal court was procured upon petition of the Sears-Slater Trustees, owners of one fee, not citizens of Illinois. Their petition (R. 112) recites diversity of citizenship and avers a separable controversy between the Illinois plaintiff and said Sears-Slater Trustees as defendants.

After removal, these petitioners filed in the District Court their motions to remand to the state court (R. 194-5) on the grounds that no separable controversy under Sec. 71, Chap. 3, Title 28 (formerly Sec. 28 of Jud. Code as amended, Act Jan. 20, 1914, c. 11) exists. The pertinent provision is:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

The motion was overruled in the District Court (R. 196-7) without opinion.

Again in the Circuit Court of Appeals by leave the motion was renewed (R. 635) and again was overruled without comment. (R. 664.)

The lease of the Sears-Slater Trustees with the respondent and the two leases of your petitioners with the respondent are identical in all relevant provisions. (R. 34, 51, 68.) The respondent's bill of complaint itself declares the question to be decided is "a common issue of law and fact substantially identical with respect to the interests of the said several defendants" (R. 29). It also says that the five tracts of land form one contiguous area covered by "one entire building" (R. 17). "None of those parts of said building which are located upon the

respective tracts of ground demised by [these petitioners'] leases, or by the Studebaker leases, or by the Peck lease, are separable from the entire building taken as a whole, but at the time of the execution of the five original leases aforesaid, all of which were substantially identical in their conditions and general provisions, it was contemplated and intended by all the parties to said leases that a single building, not separable into parts apportionable to the separate leaseholds, should be erected on said Auditorium property, and the present building was constructed in accordance with such intention, and cannot be dismembered without heavy expense and loss."

The position of the Sears-Slater Trustees as to their 10% of the fee and the position of these petitioners as to their 80% is identical in all substantial respects.

Furthermore, an unexpired first mortgage of February 1, 1889, by the lessee conveyed the leasehold as a whole on all tracts. So did an unexpired second mortgage in 1892. (R. 15 and 16.) The mortgage trustee is a necessary party defendant, actively resisting respondent's suit, and is a citizen of Illinois.

Should relief complying with the prayer of the bill of complaint ever be granted, such relief must be spread over the whole property as against all fee owners, all bondholders and all others interested. The question must be decided, if at all, by a construction of the leases, and the lease of the Sears-Slater Trustees is identical with the leases of your petitioners in all relevant provisions. No different question is to be decided as between the lessee and either set of lessors.

While the removing Sears-Slater Trustees are not citizens of Illinois, your petitioners are and at all relevant times have been citizens of Illinois, which is the state of

citizenship of Chicago Auditorium Association (R. 3). The mortgage trustee, too, always has been a citizen of Illinois. And the record indicates that the Chapins, owners and lessors of the remaining 10% (called the Studebaker fee), not heretofore specifically mentioned, are citizens of Illinois; their leases are identical in all material respects and are affected.

Denied a return to the proper forum and thus forced to remain in the federal courts, your petitioners have been further deprived of the benefit of applicable local property law.

Hence it is, and for additional reasons hereafter set forth in counsel's brief, your petitioners say review upon the granting of a writ of certiorari is proper, for that:

1. The decision of the Circuit Court of Appeals conflicts with applicable Illinois law because the Circuit Court of Appeals has sustained equity jurisdiction on the theory that these petitioners have clouded respondent's title, whereas Illinois law expressly holds that these petitioners have not clouded the title.

2. Such disregard for that local law, which shows that no cloud on title exists, is entirely responsible for the reversal of the Circuit Court of Appeals. The essential element of any wrong done by a defendant to a plaintiff does not exist when Illinois law is observed. Without that wrong or cloud, no justiciable case or controversy is presented, and the bill must be dismissed as an application for a declaratory decree.

3. Petitioners were wrongfully compelled to defend in a federal court because of lack of any separable controversy between the removing party and the respondent, thereby being further deprived of their lawful opportunity to abide by Illinois substantive law.

4. The Circuit Court of Appeals, by its decision, having failed to point out any fact or act done by any defendant in the proceeding constituting a cloud on title, has remanded the case to the trial court with directions that the trial court simply adjudicate the plaintiff's own title in the chancery proceeding. That function has been held improper by decisions of the Supreme Court of the United States and by other Circuit Courts of Appeals.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, sitting in the City of Chicago, State of Illinois, commanding the said court to certify and send to this court on a day to be designated a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that said final orders of said Circuit Court of Appeals be reversed or altered by this Honorable Court; and they also pray for such other, further or different relief as may seem proper.

And your petitioners will ever pray, etc.

MARK SKINNER WILLING and
THE NORTHERN TRUST COMPANY,
As Trustees under the Last Will and Testament of Henry J. Willing, deceased,
MARK S. WILLING,
Petitioners.

CHARLES E. HUGHES
SAMUEL TOPLIFF
HOMER H. COOPER
Counsel.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

MARK S. WILLING, being duly sworn, deposes and says that he is one of the petitioners above named; that he has read the foregoing petition by him subscribed, and that he verily believes the facts therein stated are true.

MARK S. WILLING.

Subscribed and sworn to before me, a notary public in and for the county and state above stated, duly authorized by law to administer oaths therein, this 27th day of September, A. D. 1927.

FLORENCE E. HANNA
Notary Public.

CERTIFICATE OF COUNSEL.

We, Charles E. Hughes, Samuel Topliff and Homer H. Cooper, attorneys and counsellors at law, duly admitted to practice in the Supreme Court of the United States, DO HEREBY CERTIFY that we have examined the foregoing petition for a Writ of Certiorari; that the petition is not made for delay, but, in our opinion, is wholly meritorious and ought to be granted.

Dated, September 28, 1927.

CHARLES E. HUGHES,

SAMUEL TOPLIFF,

HOMER H. COOPER,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

MAY IT PLEASE THE COURT:

At the trial, the respondent as plaintiff sought justification for its application to equity upon the numerous theories considered in the District Court's opinion, but upon appeal the respondent narrowed its contentions to the single theory that the lessors have clouded its title and, therefore, equity has jurisdiction to remove the cloud.

By its decision reversing the trial court's decree, the Circuit Court of Appeals holds with the respondent that a cloud upon title is averred, and that the existence of that cloud is a wrong which equity can remove.

Wherefore, the test of equity jurisdiction is, Do the facts and circumstances in this record constitute a cloud upon title? Only by an affirmative answer can the decision of the Circuit Court of Appeals stand; for, if there is no cloud, obviously there is nothing upon which equity can act.

We think that we can convince this Honorable Court that, under proper considerations, no cloud upon title exists. If we are granted the opportunity to do so, and succeed, the decision of the Circuit Court of Appeals must be altered.

I.

THE SUBJECT MATTER IS REAL ESTATE LYING IN THE STATE OF ILLINOIS, REQUIRING THE APPLICATION OF ILLINOIS LAW IN DETERMINATION OF QUESTIONS OF TITLE.

Under a well-established rule, running through decisions such as—

(1914) *Guffey* v. *Smith*, 237 U. S. 101;
(1883) *Holland* v. *Challen*, 110 U. S. 15; and
(1839) *Clark* v. *Smith*, 38 U. S. 195,

—Illinois substantive law *alone* is applicable to determine what title the respondent has, or whether that title is clouded.

II.

DECISIONS OF THE HIGHEST COURT OF THE STATE OF ILLINOIS HOLD THAT DOUBTFUL PROVISIONS IN AN OWNER'S MUNIMENT OF TITLE, COUPLED WITH ORAL HOSTILE ASSERTIONS BY AN ADVERSE CLAIMANT, DO NOT CONSTITUTE A CLOUD UPON THAT TITLE.

As early as 1885, the Supreme Court of Illinois, in two appeals of *Parker* v. *Shannon*, 114 Ill. 192, and 121 Ill. 452, held that—

> "Such clouds upon title, as may be removed by courts of equity, are *instruments or other proceedings in writing*, which appear upon the records and thereby cast doubt upon validity of the record title."

In 1889, the Supreme Court defined a cloud upon title in *Rigdon* v. *Shirk*, 127 Ill. 411, thus:

> "A cloud is said to be the semblance of a title, either legal or equitable, or a claim of an interest in lands, *appearing in some legal form*, but which is, in fact, unfounded, or which it would be inequitable to enforce."

In 1916 came *McCarty* v. *McCarty*, 275 Ill. 573, where two sets of claimants asserted interests in the same land under the same granting instrument. The claimants in possession filed their bill to remove, as clouds upon title, the oral hostile assertions of the adverse claimants. In brief, there was an oral dispute as to the construction of the plaintiff's one muniment of title, and the Illinois Supreme Court, holding that no cloud upon title thereby existed, said:

> "Considered as a bill to quiet title, or remove a cloud, there was no averment of fact that would give the court jurisdiction. * * * The only averment in the bill respecting any claim contrary to [complainant's] right was that some of the relatives of the testator were [orally] contending that the remainders were vested and not contingent and that it was not possible to destroy such remainders; but *courts of equity do not take jurisdiction to remove a mere verbal assertion of ownership in land as a cloud upon title.* * * * A cloud upon a title is a claim apparently valid which may be removed by extrinsic evidence, but if there was any defect in the title of [complainant] it appeared on the face of the will and resort to extrinsic evidence was not necessary. * * * No controversy in any legal form has arisen, and there is no occasion to call upon a court to quiet *a title already quiet and in a state of perfect tranquillity.*"

The last decision in point came in 1918—*Greenough* v. *Greenough*, 284 Ill. 416, where, as in the case we are petitioning to bring before this court, there was a dispute between adverse parties, based upon a difference of opinion as to the construction of a plaintiff's granting instrument of title, evidenced solely by contradictory oral assertions. In the decision, the Supreme Court of Illinois held:

> "Neither can mere verbal claims of parties against an owner in possession be regarded as constituting a cloud on his title and as giving a court of equity jurisdiction to remove the cloud."

The rule unbrokenly runs through other Illinois decisions, including:

(1922) *Buckner* v. *Carr*, 302 Ill. 378.

(1917) *Warren* v. *Warren*, 279 Ill. 217.

(1913) *First Congregational Church* v. *Page*, 257 Ill. 472.

Thus by the substantive property law of the state where our property is situated, we find that a title is not clouded unless the adverse claim is asserted in some legal form, evidenced by an instrument or some proceedings in writing appearing of record, not being the same instrument which a plaintiff must produce to show his own title, and, if removable, must require extrinsic evidence.

The acts here charged against the petitioners consist only of oral assertions of opinion as to incidental rights of user by their tenant under its leases. Our denials of the respondent's claim that it has a right to tear down our building and to rebuild were not asserted in any legal form, were not evidenced by any instrument or writing, were not of record, and, if wrong, can be shown wrong solely by construction of the only instruments under which the respondent has title.

Notwithstanding this situation, and counter to these Illinois decisions dutifully urged by us in our brief, argument and petition for rehearing (Rec., 617-8), the Circuit Court of Appeals predicates equity jurisdiction wholly upon its finding that our acts cloud the title.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE STATE OF ILLINOIS UPON THE STATUS OF TITLE TO ILLINOIS REALTY.

In the course of its opinion (see pp. 58-9, *post*), the Circuit Court of Appeals considers in a general way what constitutes a cloud upon title, saying "A cloud upon title is a relative term." But instead of measuring the relation to title by the substantive law of the sovereignty which makes possible and defines the title, the court, we respectfully urge, has completely ignored Illinois law. No effort is made to reconcile the decision with the Illinois rule we have above set forth. Instead of following Illinois decisions as to what constitutes a cloud upon title, the court deliberately chooses to follow "liberal holdings" in nine other states, none of which, by the way, goes so far.

The statement of the Circuit Court of Appeals (p. 59, *post*)—that the lessors' "position" "manifested by oral pronouncement and by their refusal to consent to the rebuilding," "in addition to the clauses" of the leases themselves, constitutes a cloud upon the lessee's title—cannot be reconciled with the land law of Illinois.

Furthermore—

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS CANNOT BE RECONCILED WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES.

In the one case decided by this Honorable Court found by us and bearing upon the immediate question—(1906)

Devine v. *Los Angeles*, 202 U. S. 313,—the court, disposing of a similar contention urged by a litigant to sustain equity jurisdiction, said:

> "We do not understand, however, that a bill will lie to dispel mere verbal assertions of ownership as clouds on title * * *."

Possibly one reason for a general rule of this kind is found in the nature of the practical relief to be granted. Ordinarily the removal of a cloud calls for removal of something concrete, definite, certain: an instrument must be canceled, etc. Here, however, the so-called cloud pointed out by the Circuit Court of Appeals is incapable of "removal"; for it is our "position respecting this lease" "in addition to the clauses" in the lessee's primary granting instrument which "constitutes a removable cloud," it is held. Repeatedly we have urged that a test of equity jurisdiction here is an attempt to draft a decree granting the relief prayed. The draftsman finds it necessary to construe the leases—and then he is done. No word, clause or paragraph of any instrument is stricken down; no document is canceled; nothing is commanded by the courts. Would our oral "position respecting this lease" be "removed" by directing us to maintain silence? And would the clauses in the lease upon which we are alleged to base our position be "removed" by striking them out of the lessee's granting instrument? If so, there would be very little of the leases left.

Manifestly, everything sought after by the respondent, and everything the Circuit Court of Appeals by its reversal says is within the judicial function, is a construction of these leases. As plaintiff below, the respondent in its bill asserts (Rec., 28):

> "Under the proper construction and interpretation of the terms, covenants and conditions of said

several leases, your orator is fully empowered and has the right to tear down and remove the present improvement as a part of and incidental to the erection of a new improvement of equal or greater value not impairing in any way the security and property right of the said lessors * * * upon furnishing proper and adequate security during the removal. * * *"

The prayer for relief, though couched in the phraseology of a bill to remove clouds (Rec., 31), in reality calls upon the courts simply to sanction that construction and interpretation. Contracts *inter vivos* may be construed in proper cases, but, inasmuch as none of the lessors here has clouded the lessee's title or committed any other wrong against the lessee, no proper case or controversy is presented entitling the respondent to a construction. Hence it is that we submit—

V.

EQUITY JURISDICTION SHOULD BE DENIED BECAUSE THE CASE STATED BY THE RESPONDENT IS AN APPLICATION FOR A DECLARATORY DECREE.

In landmark decisions, this court has spoken upon the essential elements of a justiciable case or controversy:

(1910) *Muskrat* v. *United States*, 219 U. S. 346.
(1916) *United States* v. *Alaska Steamship Co.* 239 U. S. 466.
(1926) *New Jersey* v. *Sargent*, 269 U. S. 328.

One essential element is that of a wrong done by a defendant to a plaintiff. The wrong here averred is that the lessors have clouded the lessee's title. But under proper rules that wrong does not exist; the title is not clouded. Therefore, the essential element of a

wrong is wholly lacking. Without that element, the respondent submits nothing more than an application for a declaratory decree, disguised as a bill to remove clouds. The direction of the Circuit Court of Appeals to the District Court to construe the leases is a direction to perform a task not within the judical function.

(1927) *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70.

Illinois has no declaratory judgment statute or procedure, and this suit, upon the same considerations, would fail in state courts:

(1919) *Prather* v. *Lewis*, 287 Ill. 304.
(1911) *Paine* v. *Doughty*, 251 Ill. 396.
(1900) *Seeley* v. *Baldwin*, 185 Ill. 211.

AS A BILL TO DECLARE RIGHTS UNDER THE LEASES, THE EXERCISE OF JUDICIAL POWER WOULD BE PARTICULARLY MISCHIEVOUS BECAUSE A COURT OF EQUITY IS CALLED UPON TO ADJUDICATE A PLAINTIFF'S OWN TITLE.

Whatever be the head of equity jurisprudence under which this anomalous proceeding is thrust by its proponent, the controlling question presented for examination is: Has the plaintiff the right, or title, it claims? That is to say, a court first of all must construe the leases to find the plaintiff's title before ever entering upon any inquiry as to any defendant's claim. Furthermore, the answer to the above controlling question simultaneously decides the defendant's claim. One movement—the construction of the leases—determines every main issue; for the claims are conflicting.

But that process is not removing clouds from a plaintiff's title; that is exactly the process of adjudicating the plaintiff's own title in a declaratory proceeding. Suits to remove clouds from title are not the proper way to

decide conflicting claims of the parties signatory to the plaintiff's sole muniment of title. A suit to remove clouds from title presupposes the validity and existence of a plaintiff's own title, and is directed exclusively against the alleged invalid claim of a defendant to be shown by extrinsic facts.

(1894) *Wehrman* v. *Conklin*, 155 U. S. 314, on 322.

(1907) *Lawson* v. *United States Mining Co.*, 207 U. S. 1.

And the following excerpt from (1880) *Phelps* v. *Harris*, 101 U. S. 370 on 375, stating that adjudication of a plaintiff's title is improper in a suit to remove clouds, is, we think, founded upon the constitutional separation of law and equity:

"The questions: what constitutes such a cloud upon the title, and what character of title the complainant himself must have, in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in those courts. Prominent among these are: first, that the title or right of the complainant must be clear; and, second, that the pretended title or right which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embarrass the real owner in controverting it. For it is held that, where the complainant himself has no title, or a doubtful title, he cannot have this relief. 'Those only,' said Mr. Justice Grier, 'who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.' *Orton* v. *Smith*, 18 How. 263; 59 U. S. 393; and see *Ward* v. *Chamberlain*, 2 Black 430, 444; 58 L. Ed. 319, 326; *West* v. *Schnebly*, 54 Ill. 523; *Huntington* v. *Allen*, 44 Miss. 654; *Stark* v. *Starrs*, 6 Wall. 402; 73 U. S. 925. And as to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled

> to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law."

The recent decision of the Circuit Court of Appeals for the First Circuit in (1927) *Subirana* v. *Kraemer*, 17 Fed. (2nd) 725, reiterates the doctrine, saying:

> "It is well established in the federal courts that 'those only who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or to dissipate a cloud on the title.'
>
> * * * * *
>
> Furthermore, it is not the jurisdiction of equity to adjudicate upon the conflicting titles of parties to real estate—that is for the law court; and one who brings a bill in equity to remove a cloud upon his title must not only set out facts showing that he has a clear legal title, but also set out the pretended title or right of the defendant claimed to be a cloud upon his title, that it is clearly invalid and such as may, at the present or a future time, embarrass him in controverting it."

In the cause here submitted, the respondent as plaintiff is compelled to admit its own averred title is doubtful. Were that not the situation, respondent would have proceeded to tear down the Auditorium without awaiting legal sanction. To resolve the doubt of its own self-alleged rights, the respondent is asking for an adjudication of its title. The Circuit Court of Appeals for the Seventh Circuit declares the procedure, when released from the limitations of substantive local law, a proper function for federal courts. That holding, we think, is a departure from the accepted rule and in conflict with the weight of authority.

VI.

THESE PETITIONERS WERE WRONGFULLY PREVENTED FROM LITIGATING IN THE COURTS OF THE STATE OF ILLINOIS WHERE LOCAL PROPERTY LAW WOULD HAVE BEEN FOLLOWED AND A DIFFERENT RESULT WOULD HAVE BEEN OBTAINED.

In the petition itself, we have stated the facts upon which we base our contention that the federal courts sitting in Chicago did improperly persist in retaining federal jurisdiction over this lawsuit.

The meaning of the Removal Act is not obscure. There is no separable, removable controversy unless there is a separate and distinct cause of action as to the defendants seeking removal which can be decided as between said defendants and the plaintiff in the absence of all other defendants.

(1892) *Torrence* v. *Shedd,* 144 U. S. 527.
(1882) *Fraser* v. *Jennison,* 106 U. S. 191.
(1884) *Ayers* v. *Wiswall,* 112 U. S. 187.
(1894) *Wilson* v. *Oswego Township,* 151 U. S. 56.

It is the duty of a federal court, at whatever stage of litigation it discerns that federal jurisdiction is lacking, to remand to a state court.

(1911) *Chicago, etc. R. Co.* v. *Willard,* 220 U. S. 413.
(1890) *Graves* v. *Corbin,* 132 U. S. 571.
(1892) *Torrence* v. *Shedd,* 144 U. S. 527.

The provisions in all the leases of all the lessors with the lessee, at all pertinent, are identical. The five plots of ground form one contiguous tract covered by one unseverable building, with inter-related easements of support, under two general mortgages.

The substance of the controversy is the same as to all defending lessors. The suit was begun in an Illinois

state court. Its removal to the federal court was procured upon petition of the Sears-Slater Trustees, defendants, not citizens of Illinois. They own one of the five plots. Their petition for removal shows diversity of citizenship between the Illinois plaintiff and themselves, and then avers a separable controversy between the plaintiff and themselves. But it is obvious that there was no separable controversy. There was only one controversy which affected alike all the defendants, and in any alignment of parties on either side of this controversy the Sears-Slater Trustees must be aligned with these petitioners and other defendants who are citizens of Illinois. The fact that the Sears-Slater Trustees are not citizens of Illinois, while all other active parties, plaintiff and defendant alike, are citizens of Illinois, does not support the lower courts' overrulings of our motions to remand. No expression of opinion accompanied these holdings in either court. The error seems palpable.

Whether, if review be permitted, this Honorable Court shall deem it proper to consider the question of equity jurisdiction is a point coupled directly to a possible consideration that the whole question is one for the state courts. Our immediate concern is that the petitioners not only were deprived of the benefit of local law, but were wrongfully compelled to stay in courts where local agencies for administration of state law were unable to act.

Conclusion.

The case set up by Chicago Auditorium Association is not a case or controversy for the courts. The petitioners and other lessors oppose operation of judicial force because they believe no court can grant the relief sought by respondent without making new contracts between lessors and lessee, which naturally is a matter for commercial adjustment.

Under the property law of Illinois, no lessor had clouded the title of respondent's leasehold title. If, as the Circuit Court of Appeals thinks, other states have more "liberal" holdings under which a mere "position" taken by a landlord in answer to his tenant's challenge constitutes a cloud, that, we think, is the concern of the states; and, we respectfully contend, it is not proper for the Circuit Court of Appeals for the Seventh Circuit to apply such foreign substantive law in order to determine Illinois titles or the clouds thereon.

The procedure, thus established, by which parties to contracts can obtain judicial construction or alteration of the terms thereof prior to the existence of any wrong done by one to the other is a departure opening the doorway of federal equity jurisprudence to the forbidden declaratory judgment.

The rule in the courts of the United States, as now laid down in this decision of this Circuit Court of Appeals, is as follows: A federal court of chancery has original jurisdiction to construe leases of realty whenever the parties thereto are unable to agree as to the meaning and effect of the leases to the future detriment of the lessee, because doubtful clauses of the instrument accompanied by an orally manifested position taken by a lessor adverse to an orally advanced claim made by a lessee, constitute a cloud upon the title of the lessee which federal courts, regardless of opposing local law defining clouds upon title, are empowered to remove.

Under this rule, any tenant is able to obtain a declaration of his demised rights through the fiction of creating a cloud upon his leasehold by talking with his landlord. Surely this strange doctrine should not be permitted to stand and to clutter the federal courts with as many so-called bills to remove clouds as there are similar disputes between lessors and lessees.

The writ of certiorari should be granted and review of the case should be permitted to correct these errors:

1. The decision of the Circuit Court of Appeals that the petitioners have ever clouded the title of the respondent.

(Illinois law says the petitioners have not clouded the title, and the decision conflicts with applicable Illinois law.)

2. The decision of the Circuit Court of Appeals that equity has jurisdiction.

(Since there is no cloud on title under local law, or under federal decision, there is nothing to remove. Hence, the case is an application for a declaratory decree.)

3. The refusal of the Circuit Court of Appeals and the refusal of the District Court to remand the case to the state courts under the Removal Act.

(By wrongfully retaining federal jurisdiction, the federal courts completely prevented the petitioners from invoking local substantive law.)

4. The decision of the Circuit Court of Appeals, conflicting with decisions of the Supreme Court and of other Circuit Courts of Appeals, to the effect that a federal court of chancery is empowered to adjudicate a plaintiff's legal title in a suit brought for that purpose.

Respectfully submitted,

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